UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. EARL FRANCIS HART, Defendant	)))))))	Crim. No. 09-10005-PBS

GOVERNMENT'S SUPPLEMENTAL SENTENCING MEMORANDUM IN LIGHT OF FIRST CIRCUIT'S DECISION IN UNITED STATES V. HOLLOWAY

The United States of America, by undersigned counsel, submits this Supplemental Sentencing Memorandum in advance of the January 27, 2011 sentencing of Defendant Earl Francis Hart (hereinafter, "defendant") in light of the First Circuit's decision in United States v. Holloway, 2011 WL 183963 (1st Cir. January 21, 2011).

On January 21, 2011, the First Circuit held that in assessing whether a prior conviction qualifies as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), (hereinafter, "ACCA"), a federal court may no longer conclude that a conviction under Massachusetts's simple assault and battery statute qualifies as a "violent felony" merely because the state indictment used the boilerplate language "did assault and beat." See Holloway, at *9. For the reasons set forth below, this very limited holding has no impact on defendant's sentencing.

I. Defendant's Prior Qualifying Convictions are all Assaults and Batteries with Dangerous Weapons, not Simple Assaults and Batteries

By its terms, Holloway does not apply to 18 U.S.C. § 3559. Even if it did, however, it does not impact defendant's sentencing because the predicate convictions in Holloway were simple assaults and batteries, whereas in this case, the predicate convictions, or "strikes," are all assaults and batteries with dangerous weapons (hereinafter, "ABDW"), far more serious crimes. It should also be noted that the First Circuit has already found that the crime of ABDW in Massachusetts is a crime of violence for purposes of the career offender guideline and a "violent felony" under ACCA. See United States v. Glover, 558 F.3d 71, 80-82 (1st Cir. 2009)(holding that Massachusetts ABDW qualifies as a crime of violence and finding that ABDW is "arguably more aggressive and violent" than some of the enumerated crimes of violence); see also United States v. Ellis, 619 F.3d 72 (1st Cir. 2010) (assuming ABDW is an ACCA "violent felony" and also finding that a juvenile ABDW conviction counted as an ACCA "violent felony").

Moreover, Holloway did not categorically preclude Massachusetts simple assault and battery convictions from being considered ACCA "violent felonies" (the case was remanded not reversed). See generally, Holloway, 2001 WL 183963. The court held only that it is no longer sufficient merely to point to boilerplate language to prove that a simple assault and battery qualifies as an ACCA "violent felony." Id. at *9.

In any event, ABDW is a much more serious crime than simple assault and battery. Obviously, by definition, the crime of ABDW involves a dangerous weapon. Second, ABDW has a maximum penalty of ten years in prison, whereas simple assault and battery carries a maximum of only two and a half years,[1] reflecting the Massachusetts Legislature's judgment that it was a much more serious crime. Finally, for the reasons discussed at pages 3-6 of the government's January 20, 2011 Sentencing Memorandum (hereinafter, "Gov't's Sentencing Memo,")[ECF Dkt. No. 227], ABDW is unquestionably a "serious violent felony" pursuant to 18 U.S.C. § 3559.[2]

II. 18 U.S.C. § 3559(c), not ACCA, Mandates a Life Sentence for Defendant

For the reasons discussed at pages 2-6 of the Gov't's Sentencing Memo, based on his conviction for brandishing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c), defendant is subject to mandatory life imprisonment. Holloway does not alter that.

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[1] M.G.L. 265 § 13A.

[2] There are two types of ABDW in Massachusetts: (1) intentional; and (2) reckless. See Commonwealth v. Ford, 424 Mass. 709, 711 (1997). The government discussed intentional ABDW at pages 5-6 of the Gov't's Sentencing Memo. Even if defendant were convicted of reckless ABDW, however, that too would qualify as a "serious violent felony" because the Supreme Judicial Court has held that the recklessness branch of assault and battery with a dangerous weapon requires proof of an "intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another" by means of a dangerous weapon. See id.

First, as discussed at page 5 of the Gov't's Sentencing Memo, 18 U.S.C. § 3559(c) defines a "serious violent felony" in very particularized terms; by contrast, ACCA provides its own and different definition of "violent felony." Second, and critically, unlike ACCA, 18 U.S.C. § 3559 explicitly shifts the burden to defendant to prove that his prior qualifying convictions should not be counted as "strikes." See Gov't's Sentencing Memo, pages 7-10.

III. The Court should sentence defendant to life imprisonment regardless of whether such a sentence is mandatory or discretionary.

As discussed at pages 11-14 of the Gov't's Sentencing Memo, life imprisonment for defendant is mandatory. The Court, however, should also find that, upon consideration of the factors set forth in 18 U.S.C. § 3553 and the Sentencing Guidelines, it would nevertheless exercise its considerable discretion to sentence defendant to a term of life imprisonment, the maximum penalty provided for by law upon conviction on 18 U.S.C. § 924(c).

Respectfully submitted,

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Date: January 24, 2011

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and a paper copy will be mailed to defendant Earl Francis Hart via first-class mail at Plymouth County Correctional Facility.

/s/ Zachary R. Hafer
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